

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

A&A JEWELLERS LIMITED and
A&A JEWELERS, INC.,

05-CV-0020E(Sc)

Plaintiffs,

MEMORANDUM

-vs-

and

BOGARZ, INC.,

ORDER¹

Defendant.

Plaintiffs A&A Jewellers Limited and A&A Jewelers, Inc. (collectively "A&A") commenced this action on January 10, 2005 against defendant Bogarz, Inc. alleging tortious interference with economic advantage. On February 25, 2005 Bogarz moved to dismiss A&A's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCvP") for failure to state a claim. For the reasons set forth below, Bogarz's Motion will be granted.

A&A has commenced two other actions against Bogarz which are currently pending before this Court — viz., 04-CV-0195E(Sc) and 04-CV-0473E(Sc). All three actions arise out of a general dispute as to who owns valid copyrights in various jewelry designs. A&A designs, manufactures, markets and distributes jewelry items across the United States and Canada and has an ongoing business relationship with Wal-Mart Stores, Inc. Bogarz is a designer and manufacturer of

¹This decision may be cited in whole or in any part.

family jewelry. A&A alleges that, for at least two months prior to February 25, 2005, Bogarz had been communicating with Wal-Mart in an effort to convince Wal-Mart to stop doing business with A&A based on Bogarz's belief that A&A had been selling copies of Bogarz's original designs ("the Designs") to Wal-Mart. In support of this allegation, A&A's Complaint includes a letter from Bogarz's principal, Abraham Arzerounian, to an individual at Wal-Mart's Corporate Office (the "Bogarz Letter"). The heading of the Bogarz Letter reads "Bogarz, Inc." followed directly beneath by the words "Family Jewelry Collection". The Bogarz Letter states in pertinent part:

"I am writing to voice our concern about certain other Family Jewelry items that are being sold by Wal-Mart. Two of the designs that are being sold to you by A&A Jewelers are copies of designs that were developed by Bogarz several years ago. *** For your reference, I have enclosed a copy of our copyright registration for design no.33. No. 59 copyright is pending. *** I would be grateful if you would withdraw these two designs from your line of Family Jewelry." (Pls.' Compl. Ex. A.)

A&A's Complaint states a single cause of action against Bogarz for intentional interference with economic advantage between A&A and its retail customers, including Wal-Mart. Specifically, A&A alleges that Bogarz knew that the Designs were original to A&A or its predecessors and therefore acted dishonestly in requesting Wal-Mart to stop selling A&A's jewelry items. Bogarz moved to dismiss A&A's Complaint pursuant to FRCvP 12(b)(6).

FRCvP 12(b)(6) entitles a defendant to a judgment of dismissal where a complaint fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of a plaintiff. The Court is required to read a complaint generously, accepting the material facts alleged therein as true and drawing all reasonable inferences from the complainant's allegations. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Frasier v. Gen. Elec. Co.*, 930 F.2d 1004, 1007 (2d Cir. 1991). A defendant is entitled to dismissal pursuant to FRCvP 12(b)(6) only when the court finds that "it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Review is limited, and the "issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995) (citations omitted).

To state a valid claim of intentional interference with economic advantage under New York law², A&A must allege that Bogarz's interfering conduct was "culpable", meaning either that (1) Bogarz "acted for the *sole* purpose of inflicting intentional harm on [A&A]" or (2) Bogarz "affected [*sic*] the interference by 'wrongful means.'" *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 345 F. Supp.

²The parties do not dispute that New York law applies.

2d 360, 363 (S.D.N.Y. 2004). Actions taken, at least in part, to promote or advance Bogarz's economic self-interest are, by definition, not taken for the sole purpose of harming A&A. *Ibid.*; see also *Scutti Enters. LLC v. Park Place Entm't Corp.*, 322 F.3d 211, 216 (2d Cir. 2003). "Wrongful means" is defined under New York law as "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure[, but does not] include persuasion alone although it is knowingly directed at interference with the [business relations]." *Scutti Enters.*, at 216 (citations omitted). "Wrongful economic pressure" has to be "extreme and unfair" or "egregious" and must be determined "in the light of the circumstances in which it is exerted *** and the relations between the parties". *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 192, 196, 197 (N.Y. 2004) (quotations omitted).

In support of its claim, A&A only cites Bogarz's communication with Wal-Mart. A&A makes the conclusory allegation that Bogarz's behavior was "wrongful" (Compl. ¶20); however, a business letter "voicing [Bogarz's] concern" that Wal-Mart is selling the Designs — which Bogarz claims are infringing items — cannot be considered wrongful economic pressure. See, e.g., *Catskill Dev.*, at 364-365 (finding \$3 million payment not wrongful); see also *Nadel v. Play-by-Play Toys & Novelties, Inc.*, 208 F.3d 368, 382 (2d Cir. 2000) (finding that mere suspicions are inadequate to support a claim for tortious interference with

business relations). Therefore, A&A has not sufficiently alleged and can prove no set of facts in support of its claim that Bogarz's interference was wrongful.

A&A also makes the conclusory allegation that Bogarz's interference was "done with the sole purpose of harming [A&A]." (Compl. ¶21.) Clearly, however, this is not the case. A&A states in its Complaint that Bogarz informed Wal-Mart that A&A had been selling the Designs — which Bogarz claims are copies of Bogarz's original designs — to Wal-Mart. (Compl. ¶12.) Furthermore, as the parties and the Court are well aware, A&A and Bogarz have asserted — in this and other litigations before the Court — rights to distribute, *inter alia*, the Designs. Even though A&A alleges that Bogarz knows that the Designs are original to A&A, the circumstances surrounding the interference — *viz.*, informing Wal-Mart of a potential infringement and asking Wal-Mart to stop selling the allegedly infringing items — and the litigious history between the parties indicates, at the least, that Bogarz is not certain of such. Thus, no set of facts can prove that Bogarz's *sole* motivation for the interference was to harm A&A. Whether such harm was a factor in Bogarz's decision to interfere is irrelevant because Bogarz — either entirely or partly — was motivated by its desire to protect its economic interests. It is impossible to argue otherwise. Therefore, A&A's claim will be dismissed.

Accordingly, it is hereby **ORDERED** that Bogarz's Motion to Dismiss is granted, that A&A's claim is dismissed and that the Clerk of the Court shall close this case.

DATED: Buffalo, N.Y.

September 7, 2005

/s/ John T. Elfvin
JOHN T. ELFVIN
S.U.S.D.J.